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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Communications Assistance for ) CC Docket No. 97-213  
Law Enforcement Act )  
 )

To: The Commission

**REPLY COMMENTS OF THE CELLULAR TELECOMMUNICATIONS**  
**INDUSTRY ASSOCIATION REGARDING THE SCOPE OF CALEA**  
**CAPABILITY REQUIREMENTS**

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## **SUMMARY**

The Cellular Telecommunications Industry Association ("CTIA") submits these Reply Comments regarding the scope of the assistance capability requirements of Section 103 of the Communications Assistance for Law Enforcement Act ("CALEA") as requested in the Federal Communications Commission ("Commission") Public Notice dated April 20, 1998. CTIA continues to urge the Commission to reject the broad interpretation of CALEA put forward by the Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ").

To date, DOJ has failed to provide a legal or factual basis that supports its claims that CALEA is the sweeping enabling act for the electronic surveillance capabilities it requests. In contrast, CTIA and the other commenters, have demonstrated that the industry standard, JSTD-025, is fully compliant with the capability requirements of Section 103 of CALEA.

CTIA continues to urge the Commission to remand to TR-45.2 any changes in the industry standard to ensure technical compatibility with JSTD-025. Despite DOJ fears that this will lead to delay, CTIA is confident that the process will be quicker and yield a better result than if the Commission

engages in standards setting through the public notice and comment process.

The Commission must analyze the Section 107 factors before promulgating any rule. It must develop a record to show that any proposed rule is the most cost-efficient for industry and will have the least impact on subscribers. As part of this review, the Commission should address the purported technical feasibility of network-based solutions. The record currently shows that no such solution is or will be available unless there are switch modifications by existing vendors.

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## I. OVERVIEW

On April 20, 1998, the Federal Communications Commission ("Commission") requested comment on the scope of the assistance capability requirements of Section 103 of the Communications Assistance for Law Enforcement Act ("CALEA").<sup>1</sup> CTIA filed comments on May 20, 1998,<sup>2</sup> urging the Commission to

1 Public Notice, DA 98-762, In the Matter of Communications Assistance for Law Enforcement Act, CC Docket 97-213 (released April 20, 1998) at 4.

2 See Comments of the Cellular Telecommunications Industry Association Regarding the Scope of CALEA Capability Requirements, CC Docket No. 97-213, filed May 20, 1998 [hereinafter "CTIA Capability Comments"].

interpret the requirements of CALEA narrowly -- as Congress directed -- and to reject the broad interpretation of CALEA described by the Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") (collectively, "DOJ") in their Joint Petition for Rulemaking.<sup>3</sup>

DOJ has now filed its comments in support of their interpretation of Section 103 of CALEA.<sup>4</sup> Rather than provide a legal or factual basis for their demands, DOJ merely refers the Commission back to its Petition. However, in comments filed on the scope of CALEA's capability requirements, industry has overwhelming shown that the DOJ Petition is more a statement of need and desire than of law or fact.<sup>5</sup>

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<sup>3</sup> See In the Matter of Establishment of Technical Requirements and Standards for Telecommunications Carrier Assistance Capabilities Under the Communications Assistance for Law Enforcement Act, Department and FBI Joint Petition for Expedited Rulemaking filed March 27, 1998 [hereinafter "DOJ Petition"].

<sup>4</sup> See Comments Regarding Standards for Assistance Capability Requirements, CC Docket No. 97-213, filed May 20, 1998 [hereinafter "DOJ Capability Comments"].

<sup>5</sup> Should the DOJ, in its Reply Comments, finally provide the legal and factual basis for its claims, if for no other reason than to respond to the extensive criticism of its position from all quarters made by all commenters in this proceeding, industry will not have an opportunity to respond to DOJ and any new information or legal arguments raised.

Further, in the DOJ Capability Comments, DOJ opposes any remand to the Telecommunications Industry Association ("TIA") TR-45.2 Subcommittee, which drafted JSTD-025, of any Commission-required changes in the industry standard. The reason DOJ gives for its position is that a remand "would gratuitously delay promulgation of adequate standards."<sup>6</sup> To the contrary, CTIA believes that standards development through public notice and comment process will take much longer and result in a less adequate, and perhaps arbitrary, rule than a standard developed through the consensus building process that occurs in the TR-45.2 committee.

As demonstrated in the CTIA Capability Comments, the Commission will need to take comment on the technical merit of the rule proposed by DOJ.<sup>7</sup> The Commission will face an enormous task of taking and resolving comment on any proposed technical changes in JSTD-025 -- whether or not the changes are additions to or deletions from it -- and ensuring that any

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Accordingly, CTIA expressly requests that the Commission grant the opportunity for supplemental comments to be filed 30 days after Reply Comments are due.

<sup>6</sup> DOJ Capability Comments at 26.

such changes are compatible with the existing standard. The most efficient way to ensure timely development of CALEA technology if any changes in the standard are required would be to defer to the industry standards group for consensus development under a reasonable timetable established by the Commission. Then, the Commission, if it deems necessary, can adopt the resulting industry consensus document by rule.

DOJ also asks the Commission to immediately publish the DOJ proposed rule for comment in a Notice of Proposed Rulemaking as "the next step."<sup>8</sup> CTIA believes that such a step is premature because any proposed rule must rest on an analysis of the Section 107 factors. Currently, the Commission does not have a record before it to demonstrate that DOJ's proposed rule will implement CALEA by the most cost-efficient method or that the impact on subscribers will

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<sup>7</sup> See Declaration of Kirk Carlson, CTIA Capability Comments, Exhibit 1, demonstrating the ambiguous, overbroad, inadequate or confusing nature of much of the proposed rule.

<sup>8</sup> DOJ Capability Comments at 27.



not be unduly burdensome. Any rule not based on such a record would be arbitrary on its face.<sup>9</sup>

Rather, as CTIA urged in its response to the DOJ Petition, the Commission should first declare whether JSTD-025 satisfies CALEA, as industry contends, or whether some changes are required.<sup>10</sup> The Commission's proposed rule then would

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<sup>9</sup> CTIA also notes that the Commission has been asked to determine whether the punchlist is reasonably achievable under Section 109 of CALEA. See Joint Industry Response at 14; Center for Democracy and Technology Petition for Rulemaking under Sections 107 and 109 of the Communications Assistance for Law Enforcement Act, filed March 26, 1998 at 10 [hereinafter "CDT Petition"]. The Commission has not sought comment on that request, but CTIA urges the Commission to consider that any technology development effort that will be too costly to implement is not in the public interest. Carriers have not been provided any information to date on the potential cost of either JSTD-025 or the punchlist. That information rests exclusively with the manufacturers and DOJ who have undertaken a pricing effort, the results of which should be disclosed on the record in these proceedings and subject to public comment. CTIA also notes that this pricing effort apparently does not include any of the carrier's costs of implementing a solution, a problem most acute for wireless carriers that have multiple vendors and switch types to integrate. See In the Matter of Rulemaking Under Section 1006 of the Communications Act of 1934, as Amended, and Section 107 of the Communications Assistance for Law Enforcement Act to Resolve Technical Issues and Establish a New Compliance Schedule, TIA Petition for Rulemaking filed April 2, 1998 [hereinafter "TIA Petition"] at 5 n. 5.

<sup>10</sup> See Response to Petition for Rulemaking by CTIA, the Personal Communications Industry Association and the United

include any new requirements at a high level, a schedule for TR-45.2 on remand, and the terms and conditions of an industry-wide extension pending completion of any revised standard and development of compliant technology.

Further, as CTIA has urged, the proposed rule must include a definition of when call-identifying information is "reasonably available."<sup>11</sup> DOJ reads this important CALEA limitation out of the statute in its petition.<sup>12</sup> CTIA notes that much of the punchlist can be resolved by defining this term alone.

For example, DOJ believes that an accessing carrier has an obligation to deliver post-cut-through dialing information for 800 calls even though no technology exists for the accessing carrier to differentiate such numbers from call content or numbers used to signal customer premises

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States Telephone Association, filed April 9, 1998, at 3 [hereinafter "Joint Industry Response"].

<sup>11</sup> CTIA Capability Comments at 6.

<sup>12</sup> DOJ proposes that the Commission adopt a rule that defines call-identifying information as "all dialing or signaling information" rather than reasonably available information. See DOJ Petition, App. 1 at 2 (emphasis added).

equipment.<sup>13</sup> DOJ and the FBI "endorse the development of such capability."<sup>14</sup>

No doubt, but even if CALEA required such information to be provided -- which it does not -- it would not be reasonably available to the accessing carrier. Having completed the call to the long-distance provider, the accessing carrier has no idea whether a subscriber, when pressing the keys on the phone, is playing the tune "Mary Had a Little Lamb" to someone or asking the long-distance carrier to route a call. The Commission should define reasonably available call-identifying information to be only that information available at a switch to a carrier and which is used for call processing by that carrier or collected for some business purpose.

Finally, the DOJ has opposed any industry-wide extension of the October 25, 1998, compliance date on the grounds that a network-based solution from Bell Emergis would be available by October 1998.<sup>15</sup> While no such solution will be available by

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<sup>13</sup> DOJ Capability Comments at 11, n. 2.

<sup>14</sup> *Id.*

<sup>15</sup> DOJ Reply Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date, CC

that date, the concept bears further scrutiny. It may well be that a network-based solution is more cost-efficient than the switch-based alternatives offered by equipment manufacturers, but no one knows on the record as it stands. The Commission should conduct a full inquiry into the networked approach to compliance.

**II. REMAND OF ANY TECHNICAL MODIFICATION OF  
JSTD-025 IS APPROPRIATE.**

DOJ opposes remand of any changes in the industry standard to TIA's TR-45.2 Subcommittee, which, as the Commission noted in its Public Notice, drafted JSTD-025 in the first place. DOJ's primary reason for opposing a remand is that such an action "would gratuitously delay promulgation of adequate standards."<sup>16</sup> Implicitly, DOJ's argument must assume that the Commission will have no need to take comment on the technical merit of DOJ's proposed rule. But CTIA has demonstrated in its capability comments that just the opposite is true.

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Docket No. 97-213, filed May 15, 1998, at 13 [hereinafter "DOJ Extension Reply Comments"].

<sup>16</sup> DOJ Capability Comments at 26.

Indeed, CTIA has provided the Commission a preliminary assessment of DOJ's proposed rule.<sup>17</sup> CTIA's assessment demonstrates that the proposed rule is ambiguous in key parts, overbroad in others, and in its current form will not provide the very capabilities the DOJ is seeking. For example, DOJ proposes that carriers ensure

that their equipment, facilities, or services are capable of providing to law enforcement all content of conferenced calls over a subscriber's equipment, facility, or service, where capability is defined as the ability to monitor a multiparty or conference call established by the subscriber's equipment, features, or services where two or more parties are allowed to converse after the subject leaves the conversation, temporarily or permanently.<sup>18</sup>

CTIA's expert states that this purported requirement is "a little confusing as written" and would require "separated delivery of each party of the conference call," a capability that DOJ has said is not required by CALEA at all.<sup>19</sup> As CTIA's expert points out, a conference call works by selecting

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<sup>17</sup> See Declaration of Kirk Carlson, CTIA Capability Comments, Exhibit 1.

<sup>18</sup> DOJ Petition, App. 1, proposed rule § 64.1708.

or combining the inputs from the participating parties and presenting the selected speech back to the participants.<sup>20</sup> This is why JSTD-025 requires circuit intercept access in a multiparty call to provide access "as it would be presented to" the subscriber.<sup>21</sup> This exemplifies DOJ's lack of understanding and demonstrates why DOJ should not be writing technical rules or standards.

Moreover, much of DOJ's putative delay could have been avoided had DOJ been prepared to truly engage in a standards development effort through the Enhanced Surveillance Standard ("ESS") project. As shown in Exhibit 2 to the CTIA Capability Comments, the FBI has not been capable of producing the basic standards document in over 4 months. Indeed, the FBI has not even submitted the proposed rule as a contribution to the process.

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<sup>19</sup> See Letter from Assistant Attorney General Colgate to Tom Barba, dated Feb. 3, 1998, DOJ Petition, App. 5 (separated delivery is NOT required by CALEA).

<sup>20</sup> See Declaration of Kirk Carlson, CTIA Capability Comments, Exhibit 1 at 8.

<sup>21</sup> JSTD-025, Section 4.5.1.

The ESS project has shown that the DOJ's proposed rule is inadequate on its face. This is due in no small measure to the FBI's inability to state its requirements as opposed to specifying how it wants industry to design the solution.<sup>22</sup> The Commission should not be a surrogate for the FBI to violate CALEA's express mandate that industry, not the FBI, designs the solution.

The Commission will face an enormous task of taking and resolving comments on any proposed technical changes in JSTD-025 -- whether or not the changes are additions to or deletions from it -- and ensuring that such changes are compatible with the existing standard. CTIA believes that such standards development through the public notice and comment process will be much longer than if done through TR-45.2. Indeed, the most efficient way to ensure timely development of CALEA technology should changes in the standard be required is to refer the changes to the expert industry standards group.

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<sup>22</sup> See DOJ Petition at 25; DOJ Capability Comments at 6 ("In some instances, the omitted capabilities can be implemented in only one way, and the proposed rule . . . represents the only means of satisfying the capability in question").

DOJ also contends that CALEA does not permit a remand. There is no question that the Commission can take whatever steps are necessary to implement CALEA by rule.<sup>23</sup> While the Commission could not have ordered TIA to establish a committee to prepare such standards in the first place, the Commission certainly could have promulgated rules that would have considered and relied on any technical standard developed voluntarily by any accredited industry standards setting body before publishing any NPRM. What other purpose does Section 301 serve but to allow the Commission the flexibility it needs to implement the law?

In any event, the Commission can adopt by rule any resulting standard prepared by TR-45.2. If the Commission determines that JSTD-025 needs any modification, the Commission should specify the requirements by rule. It can then remand the technical development to TR-45.2 with a schedule for development under Commission oversight. The Commission can also assign staff to attend standards meetings if it deems appropriate. Once complete, the revised standard would form the basis of an NPRM, thus satisfying any complaint

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<sup>23</sup> CALEA Section 301, *codified at* 47 U.S.C. § 229(a).



DOJ could have about whether the Commission itself has established the CALEA requirements by rule.<sup>24</sup>

Finally, despite the current dispute over the breadth of CALEA, industry has always cooperated with law enforcement in meeting its lawfully authorized surveillance needs. If the Commission should declare the need for a modification to the standard, industry will faithfully and expeditiously implement the mandate.

**III. THE COMMISSION MUST ENSURE THAT ANY RULE  
SATISFIES THE FACTORS UNDER SECTION 107.**

DOJ has made no effort to show how its proposed rule will satisfy the factors the Commission must consider under Section 107. Indeed, after making only passing and conclusory reference to these factors in the DOJ Petition, DOJ does not even reference them in their Capability Comments.<sup>25</sup>

CALEA Section 107(b) provides:

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<sup>24</sup> CTIA noted in its Capability Comments that the downside of a permanent standards rule is that future changes would have to be accomplished by rulemaking. CTIA Capability Comments at 21.

<sup>25</sup> See DOJ Petition at 59-63. DOJ devotes a scant 9 paragraphs out of 121 in its 67-page petition to the Section 107 factors.

(b) Commission Authority.--If industry associations or standard-setting organizations fail to issue technical requirements or standards or if a government agency or any other person believes that such requirements or standards are deficient, the agency or person may petition the Commission to establish, by rule, technical requirements or standards that--

(1) meet the assistance capability requirements of section 103 by cost-effective methods;

(2) protect the privacy and security of communications not authorized to be intercepted;

(3) minimize the cost of such compliance on residential ratepayers;

(4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and

(5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period.<sup>26</sup>

That these factors are not merely hortatory is clear.

Congress enacted these procedural safeguards to respond to industry concerns that CALEA would be too costly or impede

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<sup>26</sup> 47 U.S.C. § 1006(b).

technological innovation and to address privacy concerns that DOJ would go too far.<sup>27</sup>

As others have pointed out in comments, there currently is no factual record before the Commission to support adding the so-called "punchlist" items.<sup>28</sup> Indeed, the record to date consists of carriers advising the Commission that their vendors have informed them that the punchlist will be extraordinarily complex and expensive to implement.<sup>29</sup>

The record remains incomplete, however, because manufacturers have not disclosed the cost of either JSTD-025 or the punchlist. In response to the Attorney General's request, at least some vendors appear to have provided cost information to the DOJ.<sup>30</sup> However, carriers have not been privy to the information nor does CTIA believe that carrier implementation costs have been considered in the calculation.

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<sup>27</sup> H. Rep. No. 103-837, at 23, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3498-99, 3507 [hereinafter "House Report"].

<sup>28</sup> See Comments of the Telecommunications Industry Association, CC Docket No. 97-213, dated May 20, 1998, at 22.

<sup>29</sup> See, e.g., Comments of AirTouch Communications, Inc., at 9; Comments of Sprint Spectrum L.P. d/b/a Sprint PCS at 6.

The Commission should require that this information be disclosed on the record. As Sprint notes, if the punchlist requires the development effort indicated to date by vendors, then necessarily new products and services will not be forthcoming.<sup>31</sup> CALEA authorized, indeed the Congress directed, the Commission to consider this factor when deciding whether to require any change in an industry standard. Moreover, the Commission should not conclude that the mere existence of an industry consensus standard means that implementation of the resulting technology is reasonably achievable. That remains to be seen. Under CALEA, compliant technology must be available at a reasonable charge.<sup>32</sup> Until the charge is known, it cannot be said that compliance is reasonably achievable.<sup>33</sup> Therefore, any rule promulgated

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<sup>30</sup> See Comments of AirTouch Communications, Inc., at 5.

<sup>31</sup> Comments of Sprint Spectrum L.P. d/b/a Sprint PCS at 6.

<sup>32</sup> CALEA Section 106(b), codified at 47 U.S.C. § 1005(b).

<sup>33</sup> For this reason, CTIA has asked the Commission to conduct a review of JSTD-025 to determine if it is "reasonably achievable." If it waits, the Commission may well face a second round of petitions on this ground. DOJ appears to agree because in a recent *ex parte* visit to the Commission,

without consideration of the cost and impact of the punchlist would be arbitrary.

As noted above, DOJ has opposed any industry-wide extension on the grounds that a network-based solution from Bell Emergis would be available by October 1998.<sup>34</sup> As part of its review and determination of what is "reasonably achievable" under CALEA, the Commission should settle on the record whether a network-based solution, such as the Bell Emergis product, is technically feasible and more cost-efficient than switch-based alternatives.

In January, 1998, the FBI first contended in a Report to Congress that Bell Emergis would have a compliant network-

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DOJ presented the following as one of the conditions of any forbearance agreement:

If, during a subsequent proceeding, a manufacturer establishes to the satisfaction of [the Commission] that incorporation of the "hooks" for individual punch-list items is not "reasonably achievable," the manufacturer may exclude them from their design."

DOJ *Ex Parte* Presentation to Commission dated June 4, 1998, enclosure at 1. CTIA agrees, and the Commission should undertake this analysis as soon as possible.

<sup>34</sup> DOJ Extension Reply Comments at 13.

based solution available by the compliance date.<sup>35</sup> Four months later, Ameritech, in its extension petition, disclosed that it had advised the FBI in writing that the Bell Emergis solution was not technically feasible and offered to provide the detailed technical report of the reasons for the deficiency.<sup>36</sup> Interestingly, the FBI never asked for the report.<sup>37</sup>

Just one month ago, Bell Emergis submitted comments regarding extension of the compliance date and admitted that a network-based solution is NOT currently feasible without switch alterations.<sup>38</sup> Despite this record, the FBI still

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<sup>35</sup> *Communications Assistance for Law Enforcement Act (CALEA) Implementation Report*, Federal Bureau of Investigation of the Department of Justice, January 26, 1998, at 18.

<sup>36</sup> Petition for Extension of time by Ameritech, filed April 24, 1998 ("Ameritech Petition") at 6.

<sup>37</sup> *Id.*

<sup>38</sup> See Comments of Bell Emergis - Intelligent Signaling Technologies, filed May 8, 1998, at 3. Another network-based solution provider -- ADC NewNet -- has been touted by DOJ as providing CALEA-compliant solutions as well. However, ADC, in discussions with at least one wireless carrier and its vendor, admitted that it does NOT currently provide a CALEA-compliant solution and will not even be able to provide call forwarding capability until the end of 1999.

clings to the argument in opposing any industry-wide extension.<sup>39</sup>

Moreover, DOJ argues that should this one commercial solution become available, then all extensions must cease.<sup>40</sup> Because Section 106 applies to a carrier and the manufacturers of *its* equipment, whether or not a third party vendor offers a commercial solution for CALEA compliance is irrelevant.<sup>41</sup> Indeed, Congress made this clear in the legislative history:

Section [106] requires a telecommunications carrier to consult with its own equipment manufacturers and support service providers to ensure that equipment or services comply with the capability requirements. Manufacturers and support services providers are required to make available to their telecommunications carrier customers the necessary features or modifications on a reasonably timely basis and at a reasonable charge.<sup>42</sup>

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<sup>39</sup> DOJ Extension Reply Comments at 13.

<sup>40</sup> *Id.*, see also DOJ *Ex Parte* Presentation to Commission dated June 4, 1998, enclosure at 3 ("Any forbearance period granted to a carrier will terminate if a manufacturer or any person makes a solution commercially available, thus providing a reasonably achievable solution for carriers.")

<sup>41</sup> 47 U.S.C. § 1005.

<sup>42</sup> House Report at 3506.

Thus, CALEA does NOT require a carrier to go outside its normal vendor to accept some third party product that may or may not fit within its network configuration. For the same reason, CALEA cannot be read to say that a carrier with a two year extension granted under Section 107(c) automatically loses that extension should some third party solution become commercially available. DOJ's argument would require a carrier and its manufacturer(s) to invest their time and resources to develop and deploy a CALEA solution and then subject them to fines if they do not purchase an unproved technology that is declared to be commercially available.

CTIA does not reject the network-based concept out of hand, nor should the Commission. A network-based solution may turn out to be more cost-efficient than the switch-based alternatives offered by equipment manufacturers, but no one knows on the existing record. Bell Emergis has not submitted its solution to public scrutiny or testing.

CTIA believes that the Commission should conduct a full inquiry into the network-based approach to compliance to determine if it is technically feasible and whether it will provide a cost-efficient solution in a reasonable timeframe. DOJ, as the primary advocate of this approach, should be put



to the test to produce all of the data in support of its position on the record. There is no reason to delay an industry-wide extension, however, because it is obvious that carriers will be interested in any solution that is technically sound and cost-effective whenever it becomes available.

**IV. THE COMMISSION MUST ESTABLISH BY RULE WHEN CALL-IDENTIFYING INFORMATION IS REASONABLY AVAILABLE.**

CTIA has urged the Commission to include in any proposed rule a definition of when call-identifying information is "reasonably available."<sup>43</sup> As noted above, DOJ ignores this important CALEA limitation in its petition.<sup>44</sup> CTIA has urged the Commission to define reasonably available call-identifying information to be only that information available at a switch to a carrier and which is used for call processing or collected for some business purpose.<sup>45</sup>

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<sup>43</sup> Joint Industry Response at 6.

<sup>44</sup> DOJ proposes that the Commission adopt a rule that defines call-identifying information as "all dialing or signaling information" rather than reasonably available information. See DOJ Petition, App. 1 at 2.

<sup>45</sup> Joint Industry Response at 6.